guilty of keeping open his workshop for business. Com. *v.* Kirshen (Mass.), 80 N. E. 2.

It has been held in other states that statutes similar to § 3800 of the Virginia Code are not unconstitutional as discriminating between religious sects. Johns *v.* State, 78 Ind. 332, 41 Am. Rep. 577; People *v.* Bellet, 99 Mich. 151, 41 Am. St. Rep. 589. But see contra, Shreveport *v.* Levy, 26 La. Ann. 671, 21 Am. Rep. 553, disapproved in People *v.* Bellet, 99 Mich. 151, 41 Am. St. Rep. 589.

In People *v.* Bellet, 99 Mich. 151, 41 Am. St. Rep. 589, a statute was held constitutional which prohibited barbers from carrying on their business on Sunday, but excepted from its provision those barbers who observed another day as the Sabbath and actually refrained from abor on that day.

C. W. FOURL.

SUPREME COURT OF APPEALS OF VIRGINIA.

BRYAN *v.* NASH.

Nov. 18, 1909.

[66 S. E. 69.]

1. Wills (§ 434*)—Foreign Probate—Judgment—Collateral Attack.—Where the order of the circuit court, a court of general jurisdiction, in admitting an authenticated copy of a foreign will to probate, as authorized by Code 1904, § 2536, recites every fact prescribed by such section, including the fact that the copy was authenticated, necessary to the court's jurisdiction to enter it, the judgment is final, and cannot be collaterally attacked because the copy was not properly authenticated.

[Ed. Note.—For other cases see Wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434.*]

2. Wills (§ 434*)—Probate—Foreign Probate—Collateral Attack—Probate Proceedings.—In such case, that Code 1904, § 3342, prescribing how copies of wills must be authenticated, has not been complied with, would not permit a collateral attack, where no appeal was taken from the judgment admitting the authenticated copy to probate.

[Ed. Note.—For other cases, see wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434.*]

3. Wills (§ 434*)—Collateral Attack—Probate of Will—Foreign Wills.—In ejectment in Virginia for lands there situated, devised by a will probated in the District of Columbia by the Supreme Court, which had general jurisdiction of probate matters, and an authenticated copy of the will probated in Virginia by virtue of Code 1904, § 2536, the judgment of the foreign court admitting the will to pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

bate cannot be attacked because of irregularities in the certificate of the execution of the will, and defects in the probate proceedings.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 937-945; Dec. Dig. § 434.*]

4. Judgment (§ 474*)—Collateral Attack—Jurisdiction—Presumption.—It is where a court of special jurisdiction has conferred on it special powers by special statutes which are only exercised ministerially, and not judicially, that no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of special jurisdiction must appear on the face of the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 909; Dec. Dig. § 474.*]

Error to Circuit Court, Rockbridge County.

Ejectment by Addie Nash against W. L. Bryan. From a judgment for plaintiff, defendant brings error. Affirmed.

Glasgow & White, for plaintiff in error.
G. D. Letcher and *E. M. Pendleton,* for defendant in error.

CARDWELL, J. Archie Ranson owned, together with a sister, Alice Ranson, about 12 acres of land in Rockbridge county, with a small house thereon. Alice Ranson died in the fall of 1901 intestate, unmarried, and without issue, leaving her brother her only heir at law. Archie Ranson lived the last years of his life in Washington, D. C., and died there April 18, 1902, leaving a will, which was probated in the probate division of the Supreme Court of the District of Columbia within a few months thereafter.

By said will the testator, Archie Ranson, devised his land in Rockbridge county to Addie Nash, to whom he was engaged to be married. A copy of the will was probated in the circuit court of Rockbridge county, and the order of probate is as follows:

"State of Virginia, At Rockbridge Circuit Court, December 21st, 1906.

"The last will and testament of Archie Lewis Ranson, deceased, having been heretofore proved and admitted to probate and recorded in the Supreme Court of the District of Columbia, as appears from an authenticated copy thereof, together with copy of the proof of the will and copies of orders of probate thereof thereto attached, was this day produced in court. And it appearing that the said will was duly executed as a will of personalty in the District of Columbia, the testator's domicil, and was so executed as to be a valid will of lands in the state

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

of Virginia by the laws thereof, on motion of Addie Nash, one of the beneficiaries under said will, it is ordered that the said copy of Archie Lewis Ranson, deceased's will, proved and admitted to probate and certified as aforesaid, be admitted to probate in this court as the last will and testament of the said Archie Lewis Ranson, deceased, both as a will of real and personal estate, and be recorded in the clerk's office of this court. And it is further ordered to be entered of record that the value of the estate passing by the said will in the state of Virginia was estimated at $500, and that $1 state tax was paid on the probate thereof.

"Teste: A. T. Shields, Clerk."

This probate proceeding was had pursuant to section 2536, Code 1904, which is in this language:

"Sec. 2536. Probate of Copy of Will Proved Without the State; To What Extent Admitted to Probate.—Where a will relative to etsate within this state has been proved without the same, an authenticated copy thereof, and the certificate of probate thereof, may be offered for probate in this state. When such copy is so offered, the court to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or county of the testator's domicil, and shall admit such copy to probate as a will of personalty in this state. And if it appear from such copy, that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this state by the law thereof, such copy may be admitted to probate as a will of real estate."

It appears that, soon after the death of Archie Ranson, W. L. Bryan, whose lands adjoined, desired to purchase the 12 acres of which Ranson died seised, and to that end he on May 14, 1902, addressed a letter to the "Heirs of Archie Ranson" at Washington, D. C., which letter fell into the hands of a colored lawyer Fountain Peyton, counsel for Addie Nash, and who answered Bryan's letter on July 21st, and Peyton's letter was replied to by Bryan August 14, 1902. The purpose of this correspondence on the part of Bryan, which was kept up till in April, 1903, was doubtless twofold—first, to ascertain if Archie Ranson had left a will, and, second, to purchase at private sale the 12 acres of land from the rightful owners thereof. A part of this correspondence was conducted by Bryan claiming to be the next of kin of Archie Ranson residing in Rockbridge county, in which it was represented to Addie Nash that there were debts being asserted against the interest of Alice Ranson in the land, and that, unless they were satisfied, the land would be sold, etc. At all events, the efforts of Bryan to purchase the land privately

having failed, and the will of Archie Ranson not having been up to that time produced and probated in Rockbridge county, a chancery suit was instituted in the circuit court of Rockbridge county in August, 1903, by one John A. Ranson, the purpose of which was to have sold the 12 acres of land in question for petition among the plaintiff in that suit and certain defendants, named as the heirs at law of Alice Ranson, deceased, claiming that she had survived Archie Ranson, etc., and in that suit the said land was sold by a commissioner of the court to W. L. Bryan at public auction, the sale confirmed, the purchase money, $255 paid, and a deed of conveyance made and delivered to Bryan, bearing date June 5, 1905.

At the second August rules, 1907, this action of ejectment was brought in the circuit court of Rockbridge county by the said Addie Nash against the said W. L. Bryan to recover the said tract of 12 acres of land claimed by her under and by virtue of the said will of Archie Ranson, deceased, and upon a trial of the cause upon the defendant's plea of the general issue and a special plea of set-offs for improvements to the land the jury rendered its verdict in favor of the plaintiff for the land, allowing nothing for the defendant upon his plea of set-offs, and the court entered its judgment upon the verdict, to which judgment this writ of error was awarded the defendant.

The first assignment of error presents the question whether the copy of the will of Archie Ranson, deceased, was properly admitted to probate by the circuit court of Rockbridge county on December 21, 1906; the contention being that the copy of the will admitted to probate was never duly authenticated.

There is no merit in this assignment of error. The order of the circuit court admitting the will to probate recites every fact prescribed by the statute (section 2536, *supra*) necessary to the court's jurisdiction to enter it, and, being a court of general jurisdiction for the probate of wills, its judgment is final, and cannot be collaterally attacked.

In an elaborate argument, citing a great number of authorities, it is urged that there are irregularities in the certification of the execution of the will and of its probate in the probate court of the District of Columbia; but to follow up the argument, and to review the authorities cited in support of it, would be but going over the same ground that this court has gone over again and again to the conclusion repeatedly announced, that "a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it from probate, as long as it remains in force, binds conclusively, not only the immediate parties to the proceeding in which the sentence is had, but all other persons, and all other courts." That was announced as the state of the law in Connolly *v.* Connolly, 32

Gratt. 657, and has since been adhered to. Many of the decided cases that had gone before the case of Connolly *v.* Connolly were cited, and we shall refer to a few of them.

In Lancaster *v.* Wilson, 27 Gratt. 629, referring to a judgment of probate of a will holding that such judgment is conclusive and final as to collateral attack, the court said: "It is not merely an arbitrary rule of law, established by the courts, but it is a doctrine founded upon reason and the soundest principles of public policy. It is one which has been adopted in the interest of the peace of society, and the permanent security of titles."

Plaintiff in error relies on section 3342 of the Code in support of the contention that the copy of the will of Archie Ranson admitted to probate in the circuit court of Rockbridge county was not duly authenticated; but with that statute, which merely prescribes how the records and proceedings of another state, or of the United States, are to be authenticated in order that they shall have faith and credit given them in the courts within this state, we are not concerned in this case. What would have been the force and effect of the statute had there been an appeal taken from the decision of the circuit court of Rockbridge county admitting the will of Archie Ranson to probate we are not called upon to determine in this litigation. As we have remarked, the order of the court admitting the will to probate recites every fact necessary to its jurisdiction under the statute (section 2536, *supra*), and whether its judgment was in the exercise of the court's powers as a court of general jurisdiction or of special powers conferred upon it by the statute touching the probate of wills, as was unquestionably the case, the judgment is final, and cannot be collaterally attacked. It is where a court of special jurisdiction has conferred upon it special powers by special statutes, which are only exercised ministerially and not judicially, that no presumption of jurisdiction will attend its judgments, and the facts essential to the exercise of special jurisdiction must appear on the face of the record.

When a court of general jurisdiction acts within the scope of the general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be impeached.

"When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, its judgment cannot be collaterally impeached." Pulaski County *v.* Stuart, 28 Gratt. 872.

As said in State of California *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118: "The probating of a will is not a proceeding to decide a contest between parties, but a proceeding in rem, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment; and therefore the

decree of probate is conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts. The danger which might be apprehended from holding as conclusive upon so important a matter as the probate of a will the decree of a single court, and that not of the highest jurisdiction, is guarded against by the right of appeal to the Supreme Court, and by the statutory provision allowing the decision to be opened and the validity of the will to be again contested in the same court by any one interested within one year from the admission to probate."

To the same effect is Schultz *v.* Schultz, 10 Grat. 358, and in a note to a report of that case, in 60 Am. Dec. 353, the authorities are collated, and among those cited are Ballow *v.* Hudson, 13 Grat. 682; Norvel *v.* Lessueur, 33 Grat. *222*; Connolly *v.* Connolly, *supra.*

The case of Norvel *v.* Lessueur, *supra,* is directly in point here, and reiterates that it is a settled rule of law in Virginia that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except of an issue *devisavit vel non* within the time and in the mode prescribed by the statute.

In that case, the opinion by Staples, J., reviews many of the prior decisions of this court, citing them with approbation, including Robinson *v.* Allen, 11 Grat. *787*, where the will of a married woman was admitted to probate in the county court of Fauquier, although at the date of the will a married woman could not make and publish a valid testamentary paper; but this court held that, as the will appeared to have been regularly admitted to probate in the proper court, its validity could not be questioned collaterally.

In 1 Woerner on Am. L. of Administration, § 145, following a discussion of the powers of judicial tribunals, the conclusiveness of their judgments in collateral proceedings is considered; and, after speaking of the development and growth of the jurisdiction of the courts of probate in the United States, and stating that it has given occasion to considerable divergence of authority on the question, whether their judgments are conclusive or impeachable collaterally, it is said: "The uncertainty produced by the vacillation of courts in this respect is not only perplexing to the administrators, practitioners, and judges, but injurious and sometimes ruinous to the interests of all persons concerned in the administration of estates, and particularly to the purchasers of real estate sold under the order of probate courts, who sometimes lose the fruits of their purchase because the officers of the court are not sufficiently skilled or careful to let the record show all jurisdictional facts; and to the heirs or creditors, because the risk incurred by purchasers depresses the price of the property at

the sale." "But," continues the learned author, "on principle there seems to be no difficulty attending the question, except, perhaps, to ascertain whether the tribunal intrusted with jurisdiction in probate matters is a court with judicial functions in the common-law sense, or whether its functions are ministerial only, or having no authority beyond special powers for the performance of specific duties not relating to the general administration of justice. If the latter be the case, it is obvious that, to give validity to its acts, it must affirmatively appear that everything necessary to such end has been observed. But, if it be found that the tribunal is one competent to decide whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that, if it decides that it has jurisdiction, then its judgments within the scope of the subject-matter over which its authority extends in proceedings following the lawful allegation of circumstances requiring the exercise of its power are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. It matters not how erroneous a judgment. Being a judgment, it is the law of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally would be to ignore practically, and logically to destroy, the court. And it is not necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the fact of their proceedings, because, being competent to decide, and having decided, that such facts exist by assuming the jurisdiction, this matter is adjudicated, and cannot be collaterally questioned." Among the authorities cited in support of the text just quoted in Cox *v.* Thomas, 9 Grat. 323.

It is argued, however, by the learned counsel for the plaintiff in error in this case that the law as laid down in the authorities to which we have referred does not apply to the probate of an authenticated copy of a will. This view, however, cannot be sustained by any authority to be found in the decisions of this or other courts. We have not been able to find a decision of this court covering directly the point made, but it has been dealt with in a number of cases decided in other states and adversely to the view contended for by the learned counsel for plaintiff in error; and the case of Calloway *v.* Cooley, 50 Kan. 743, 32 Pac. 372, is directly in point. It was there held that: "Where a will executed, proved, and admitted to probate in another state is presented for record to the probate court of a county in this state, in which land belonging to the estate is situate, and such court, upon the evidence submitted, finds and adjudges that the authentication of the copy presented for record is sufficient, its adjudication thereon cannot be collaterally attacked." Again, the

opinion at page 754 of 50 Kan., at page 376 of 32 Pac., says: "The probate court is vested with full power to inquire into the sufficiency of the authentication, and to ascertain whether under the proof offered the will should be admitted to record. Being vested with jurisdiction, its finding and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack. The statutes provide that the existence of certain facts are necessary before a will executed and proved in another state can be admitted to record in this state. One of the requisite facts is that the copy of such will presented for record shall be duly authenticated. This fact is to be determined upon proof, and the authority to determine it is conferred upon the probate court. * * * Under the statutes, these requisite facts must be determined by the probate court; and it having exercised the jurisdiction, its determination, although it may have been erroneous, is conclusive upon all interested parties and all courts until it is reversed or reviewed in some appropriate proceeding."

In that case it appears, as in this case, that only a certificate of the facts proved and the fact of probate were certified, and the statute of Kansas was to the same effect as section 2536 of our own Code, *supra,* expressly requiring an authenticated copy of the will and the certificate of the probate thereof. In other words, the statute provides that, when a copy of will relative to estate within this state is presented for probate in this state, the copy presented shall be authenticated by a certificate of the probate thereof in the court of another state. And this is exactly what was done in this case, as shown by the order of the circuit court of Rockbridge county admitting the will here in question to probate. See, also, Whalen *v.* Nisbit, 95 Ky. 464, 26 S. W. 188, dealing with a statute of Kentucky similar to the Virginia statute (section 2536, *supra*).

Having taken the view that the circuit court did not err in admitting in evidence in this case the will of Archie Ranson probated in the circuit court of Rockbridge county, it becomes unnecessary to consider the assignments of error relating to the instructions given by the court, for the reason that upon the facts proven before the jury there could not have been any other verdict than the one rendered by the jury in favor of the plaintiff, Addie Nash, for the land in question.

Nor do we deem it necessary to consider the argument made by the learned counsel, that the plaintiff, Addie Nash, is estopped to set up title to the land in question, since the facts abundantly show that the same doctrine might with equal propriety be invoked by her against the defendant Bryan. The plaintiff under section 2547-a, Va. Code 1904, had seven years from the date of

the death of the testator, Archie Ranson, within which to probate the will before the circuit court of Rockbridge county, having jurisdiction for that purpose, and therefore she was wholly within her right when she did offer the will for probate in December, 1906; and there is nothing in the testimony in this case even tending to show that she purposely or otherwise deceived or misled the defendant, Bryant, while, on the other hand, there is proof that Bryan knew that the plaintiff, Addie Nash, was claiming the land in question under and by virtue of a will executed by Archie Ranson and probated in the District of Columbia in 1902, and wrongfully undertook to acquire title to the land from sources other than the rightful owner.

Upon the whole case we are of opinion that the judgment of the circuit court of Rockbridge should be affirmed.

Affirmed.

Note.

This case applies to the probate of an authenticated copy of a foreign will, already probated in another state, the well settled rule that the order of a court of general jurisdiction, admitting a will to probate, is conclusive and final as to collateral attack. The rule is perfectly well settled by the Virginia decisions as to the probate of domestic wills, and is well established generally (see extensive note in 21 L. R. A. 680), and we can see no reason why the same doctrine should not apply to an order admitting to probate a copy of a foreign will. The court says that it has not found a decision of this court covering directly the point made by the appellant that the law as laid down in the authorities "does not apply to the probate of an authenticated copy of a will." The case of Lemon *v.* Reynolds, 5 Munf. 552, does however seem to recognize the application of the principle to a case of an order admitting to probate a copy of a lost or destroyed domestic will. Here it was held that, in a suit for freedom, the validity of a will, under which the plaintiff claims, ought not to be questioned; the same (or a copy thereof, the original being destroyed) having been admitted to record, as and for the last will of the testator, by the proper court, whose judgment remains unappealed from, and the validity of such will cannot be contested in equity. It is a very short step farther to apply the principle to the probate of a copy of a foreign will, as done here, and in the Kansas case cited by the court (Calloway *v.* Cooley, 50 Kan. 743, 32 Pac. 372), and the propriety and correctness of so doing will be hard to disprove.

In addition to the cases cited in the opinion as supporting the conclusiveness against collateral attack of an order of a court of general jurisdiction admitting to probate the copy of a foreign will, see re Clark (Cal.), 1 L. R. A., N. S. 996, where, in the opinion of Beatty Ch. J., on rehearing, it is said, at p. 1005:

"When a will has been admitted to probate here on proof of its admission to probate in some other jurisdiction, not including the domicil of the decedent, the decree and proceedings regularly taken under it are, of course, secure against what, in Goldtree *v.* McAlister, 86 Cal. 93, 24 Pac. 801, is held to be collateral attack, and this, irrespective of the question whether that decision can be reconciled with a correct construction of the statute. Correct or not, the rule of that case has

become a rule of property, and as such must be upheld upon the doctrine of stare decisis, for the protection of vested rights."

See also, Parker *v.* Parker, 11 Cush. (New Hampshire) 519; Stull *v.* Veatch, 236 Ill. 207, 86 N. E. 227; Cohen *v.* Herbert, 205 Mo. 537, 104 S. W. 84; Ruef *v.* District Court (Mont.), 85 Pac. 866, 6 L. R. A., N. S., 617, with case note. And see lengthy note in 48 L. R. A. 130.

J. F. M.

PULASKI ANTHRACITE COAL CO. *v.* GIBBONEY SAND BAR CO.

Nov. 18, 1909.

[66 S. E. 73.]

1. Appeal and Error (§ 1064*)—Review—Harmless Error—Conflicting Instructions.—The doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, because of the impossibility of saying by which the jury were guided.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

2. Torts (§ 22*)—Joint Tort-Feasors—Persons Acting Independently.—Where persons each separately operating a different coal mine, acting independently, put waste therefrom into a stream, some of which is carried by the water onto the land of another, one of them is not liable as a joint tort-feasor for the entire injury, however difficult it be to measure the damage caused by each.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 29; Dec. Dig. § 22.*]

Error to Circuit Court, Pulaski County.

Action by the Gibboney Sand Bar Company against the Pulaski Anthracite Coal Company. Judgment for plaintiff. Defendant brings error. Reversed and remanded for new trial.

Phlegar & Powell and *Longley & Jordan,* for plaintiff in error.
W. B. Kegley and *John L. Draper,* for defendant in error.

CARDWELL, J. The defendant in error brought this action against plaintiff in error, and recovered a verdict and judgment for $1,000 damages, alleged to have been sustained by the plaintiff by reason of the deposit of slack, slate, culm, and mine refuse in and along the banks of New river from the defendant's coal mine, which slack, etc., it is alleged was carried down the river and thrown upon the sand bar of the plaintiff, situated on

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.